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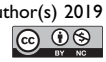
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Judgment of the German Constitutional Court on the (un)constitutionality of welfare sanctions BVerfG, 05.11.2019 – 1 BvL 7/16

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Introduction

On 5 November 2019, the German Federal Constitutional Court (*Bundesverfassungsgericht, BverfG*) announced its landmark judgment on the constitutionality of welfare sanctions in the German social assistance scheme known as *Hartz IV*.[1] The decision demolished a big portion of the applicable sanctioning regime after the Court unanimously found that the mandatory reduction of welfare benefits is in grave violation of the constitutionally guaranteed subsistence minimum. The long-awaited judgment is expected to shape social assistance in Germany for years to come, and it will most likely also have a reflective impact at an international level. The following discussion provides an overview of the facts of the case, the normative constitutional requirements and the judgment itself. The final part sketches a conclusion and future outlook.

Facts of the case

The case started in 2014, when the body responsible for the administration of *Hartz IV* benefits (*Jobcenter*) reduced the benefits of an unemployed individual for refusing to comply with the claimant obligations. The man, who had previously been trained as a warehouse worker, rejected an invitation by the *Jobcenter* to apply for an open position at a warehouse. He said he was no longer interested in working in a warehouse and wanted to find a job as a shop assistant instead. The *Jobcenter* decided that this refusal constituted a violation of the duty to cooperate by accepting

1. BVerfG 05.11.2019, 1 BvL 7/16.

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suitable employment and imposed a sanction of 30 per cent reduction of the man's benefit. Several months later, the *Jobcenter* approached the unemployed man with a reintegration plan that would enable him to do an internship as a shop assistant in order to obtain the necessary work experience. The man again refused to follow up on the plan, and the *Jobcenter* imposed a higher 60 per cent sanction for repeated non-compliance with the duty to cooperate. The man challenged both decisions of the *Jobcenter* in front of the Social Court in Gotha (SG Gotha) on the grounds that the sanctioning regime in *Hartz IV* is unconstitutional. The SG Gotha expressed its doubts about the constitutionality of the applicable rules and decided to refer the case to the Constitutional Court using the procedure which allows all national courts to challenge acts of parliaments in front of the country's highest court.[2] In May 2016, the Constitutional Court declared the case non-admissible[3] due to a procedural technicality: The SG Gotha had failed to establish whether the sanctioned individual was informed of the legal consequences of non-compliance. In other words, it was not clear whether the sanction was imposed in accordance with the law. Normally, this would have been a dead-end for the constitutional examination in the present case. However, the SG Gotha adopted a surprising approach. It invited the sanctioned person to a court hearing where it asked him whether he was aware of the consequences, and the man confirmed that he was very much aware of the existing threat of sanctions. Having established that the person was in possession of the required information, the SG Gotha referred the case to the Constitutional Court for a second time, because it was 'convinced'[4] of the unconstitutionality of the sanctioning regime.

The basic right to a guaranteed subsistence minimum

The constitutional review of German welfare sanctions was based on the standards of protection established by the basic right to a guaranteed subsistence minimum. This unwritten basic right was developed by the judiciary over the decades as a derivative of human dignity and the social state principle (Articles 1(1) and 20(1) of the German Constitution).[5] The right to a guaranteed subsistence minimum has a mixed character. On the one hand, it constitutes a direct, subjective right which entitles individuals to minimum levels of public support. On the other hand, it is an overly abstract right that requires concretisation by the legislator for its application in practice. Generally speaking, the Constitutional Court awards the national parliament a wide margin of appreciation when implementing social assistance measures that provide the realisation of this basic right.

The right to a guaranteed subsistence minimum secures the means that are necessary for securing the physical existence of individuals (food, clothing, accommodation, heating, hygiene and health) and for enabling basic participation in social, cultural and political life. The right assumes an obligation by the state to provide support to citizens who do not dispose of the required means. This duty to provide, however, may come into conflict with another state duty – to promote reintegration into paid employment. This is especially true in the current landscape where the legislator has decided to promote reintegration by using the threat of welfare sanctions. In the present case, the Constitutional Court attempted to balance out the strained relationship between welfare sanctions and the guaranteed existence minimum.

2. In German this procedure is known as konkrete Normenkontrolle, cf. Article 100(1) German Constitution.
3. BVerfG 26.05.2016, 1 BvL 7/15.
4. BVerfG 05.11.2019, 1 BvL 7/16, § 81.
5. Ibid, §§ 118-128.

The judgment of the German federal constitutional court

a). The effectiveness of welfare sanctions and inconsistent practice

After providing a detailed overview of the applicable legal rules and their historical background, the Constitutional Court made several important preliminary observations on the effectiveness of sanctions and their application in practice.[6] § 55 SGB II formulates the obligation of the German government to examine the effects of the provision of social assistance benefits on a regular basis. The Court pointed out that, in spite of this state duty, to date there has been no comprehensive examination of the effects of the German welfare conditionality regime in §§ 31, 31a, 31b SGB II. The Court referred to the handful of German empirical studies on the effectiveness of sanctions with the remark that these studies are inconsistent with respect to their methods, how representative they are, and their results. Accordingly, the judges noted that there is no empirical evidence that the threat of sanctions has a positive effect on promoting compliance with the duty to cooperate. On the contrary, some studies point towards the conclusion that sanctions may be counter-productive for the social reintegration of unemployed individuals and highlight the dangers of pushing vulnerable people into isolation, destitution, homelessness or survival crime and further distancing them from the services of the *Jobcenter*.

Furthermore, the German Constitutional Court highlighted the inconsistent sanctioning practices in *Hartz IV* by referring to empirical research which suggests that the biggest factor behind the question of whether a sanction is imposed in an individual case is the particular *Jobcenter* which administers the claim. In many cases, *Jobcenters* are reported to award themselves legally non-existent discretion by not imposing mandatory sanctions in cases where they are expected to have the counter-productive effect of increasing individual hardship.[7]

b). Constitutional review of welfare sanctions

i). Introduction. At the centre of the judicial review was the constitutionality of the German welfare sanctions laid down in §§ 31a(1), 31b SGB II.[8] Under the contested legislation, non-compliance with the duty to cooperate must at all times be punished by a reduction in welfare benefits. The amount of the reduction is 30 per cent for first offenders and 60 per cent or 100 per cent in cases of recidivism. All sanctions are imposed for a period of three months. As noted earlier, the choice of the legislator to punish non-compliance by (partially) withdrawing welfare benefits conflicts with the constitutionally guaranteed subsistence minimum. The Constitutional Court approached this tension in a careful yet firm manner. It began by reaffirming the wide margin of appreciation which is awarded to the federal parliament in implementing social assistance. This discretion allows the legislator to choose how to translate the abstract requirements of the right to a guaranteed subsistence minimum into practice. The Court also confirmed that a sanctions-based system which promotes compliance through the use of negative incentives pursues legitimate purposes. When it comes to the question of the proportionality of benefit reductions, however, the available leeway for the legislator quickly narrows down. The reason for this is the impact of benefit sanctions on the constitutionally guaranteed minimum. The limited margin of appreciation of parliament

6. Ibid, §§ 57-67.
7. Ibid, § 67.
8. Ibid, §§ 153-209.

corresponds to a higher degree of judicial scrutiny. Accordingly, the Court subjected benefit contested sanctions to a strict proportionality test and carefully examined whether they are suitable, necessary and reasonable. Three important aspects of the benefits sanctions are scrutinised: their severity, their mandatory nature and their duration.

ii). The severity of the sanction. The Constitutional Court examined the three levels of sanctions separately, being more lenient in its review of the 30 per cent benefits reduction and becoming increasingly rigorous when examining the 60 per cent and 100 per cent sanctions.[9] The main point of concern which cast its shadow on the proportionality test relates to the effectiveness of the sanctions which, as the Court noted in an earlier part of the judgment, is still not justified by any comprehensive empirical research. Against this background, the suitability and necessity of benefits reductions as reasonable measures for promoting compliance in social assistance remains just an assumption. In the context of the 30 per cent benefits reduction, the Court displayed a readiness to accept such an assumption. The violation of the subsistence minimum remains here within limits, and the legislator has sufficient discretion to base this measure on a 'prognostic estimation' of its effectiveness. This, however, does not apply to the 60 per cent and 100 per cent sanctions. According to the Court, these measures create an extraordinary level of hardship for the sanctioned individuals. Considering the low level of benefits under *Hartz IV* which, as the Court noted, are 'barely sufficient' to cover the constitutionally guaranteed minimum in the first place,[10] a reduction of this extent clearly deprives individuals of their means of subsistence. This motivated the Court to carry out a very strict proportionality test. Against the background of such a grave interference with the protected basic right, the legislator can no longer rely on the plausible assumption that the measures are effective. In the absence of any empirical research, the Court based its judgment on currently available insights, according to which reductions in benefit are not only ineffective but may also be counter-productive. A reduction of 60 per cent or more can have a devastating effect on the most vulnerable groups of sanctioned individuals, thus pushing them into high debt, survival crime and homelessness, and they may drop out of the social protection system all-together.

The Court reached the conclusion that the 60 per cent and 100 per cent benefits reductions do not satisfy the strict requirements of the proportionality test. These sanctions are neither necessary nor suitable for promoting reintegration by creating incentives for compliance, and, in individual cases, they can even lead to social exclusion. Accordingly, the Court declared that these provisions are unconstitutional and conferred on the legislator the duty to adopt new legislation to replace them. In the meantime, *Jobcenters* are no longer allowed to punish (repeated) non-compliance by reducing benefit levels by more than 30 per cent.

iii). The mandatory nature of the sanction. The second aspect of German welfare sanctions which was examined critically in the present judgment is their mandatory nature.[11] The contested legislation does not leave any margin of discretion to *Jobcenters* to refrain from imposing a sanction in the event of non-compliance and every breach of cooperation duties must be punished with a benefit sanction. This approach was found to be insufficiently flexible and to give rise to the inconsistent

9. 30 per cent sanction: Ibid, §§ 158-188; 60 per cent sanction: Ibid, §§ 189-200; 100 per cent sanction: Ibid, §§ 201-209.
10. Ibid, § 190.
11. Ibid, §§ 176, 181, 184-185, 207.

practice described earlier. In the eyes of the Court, *Jobcenters* should be able to decide against imposing a sanction when the circumstances of the case demand this. The Court pointed out that reducing the benefits of people with psychological problems or individuals who are hardly employable is ineffective and contrary to the aim of reintegration. Accordingly, the Court found that the mandatory nature of the sanctions in § 31(1) SGB II failed every step of the proportionality test. The legislator had several possible courses of action: it could adopt discretionary clauses allowing *Jobcenters* to refrain from imposing sanctions that would obviously be ineffective, or introduce a hardship clause which spared the sanction in individual cases to avoid personal hardship.[12] Until the legislator has remedied the unconstitutionality of the provision, the Court announced that § 31(1) must be interpreted in a way that includes both a discretionary clause and a hardship clause.

iv). The duration of the sanction. Finally, the federal constitutional court addressed the duration of benefit sanctions reduction which is set at three months.[13] The judges expressed their scepticism with regard to the fixed duration. Once again, the legislative framework was found to be insufficiently flexible to cater to the needs of individual cases. It created no incentives for sanctioned individuals to alter their behaviour and become compliant before the sanction was lifted. Instead of promoting compliance with claimant duties, lengthy sanctions can create disincentives and even cause unemployed individuals to terminate their contact with the *Jobcenter*.

Against this background, the Court did not accept that the fixed duration of three months is necessary or suitable for achieving the aim of the sanction. The constitutional requirements allow the state to withhold the provision of the guaranteed minimum only when and insofar unemployed individuals do not comply with their duty to cooperate.[14] Having failed the proportionality test, the Court declared that the duration of sanctions was unconstitutional and decided to inject a reparation clause into the respective provision. Under this clause, the *Jobcenter* can suspend the effect of the sanction before the three months in cases where sanctioned individuals have declared that they are 'seriously and sustainably' willing to fulfil their claimant duties.

Conclusion and future outlook

The decision of the Federal Constitutional Court is a remarkable contribution to the rights-based approach to social assistance in Germany. The Court did not hesitate to set clear boundaries to the wide discretion of the federal parliament in cases where the adopted measures deprive individuals of the constitutionally-guaranteed subsistence minimum. The Court confirmed that claimant duties and benefit sanctions are not, in principle, incompatible with the right to a guaranteed subsistence minimum. However, a more rigorous examination of the proportionality of these measures is mandated to the extent that their impact on protected human rights is a matter of greater concern.

In the light of the proportionality test, the Court highlighted the importance of examining the effects of the adopted policies on vulnerable groups. Far-reaching reductions in benefits must be supported by clear empirical research evidence that they contribute to the reintegration of the unemployed. This requirement feeds back to the primary aim of social assistance and limits the discretion of the state to adopt welfare conditionality for purely symbolic or paternalistic purposes.

12. Ibid, § 185.
13. Ibid, §§ 177, 181, 184, 208.
14. Ibid, § 133.

A possible by-product of this judgment may be the first comprehensive empirical research on the effects of welfare sanctions in German social assistance.

Finally, the judgment of the Constitutional Court demonstrates the role of mitigation clauses as vital tools for keeping the effects of sanctions consistent with the aim of social reintegration. Discretionary clauses, hardship clauses and reparation clauses allow welfare administrators to mitigate the negative effects of sanctions in cases where the measures are counter-productive for the reintegration of vulnerable individuals.

At the international level, the decision of the Federal Constitutional Court will not go unnoticed. While the concepts of a guaranteed subsistence minimum and mitigation clauses will not be new for the international legal order[15] or for the academic community,[16] the expectation is that this most recent judgment will catalyse the debate on the development of more comprehensive standards of minimum social protection.

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15. Article 13 European Social Charter; Article 9 International Covenant on Economic, Social and Cultural Rights; ILO Social Protection Floors Recommendation (No. 202).
16. Cf on the right to social assistance: Vonk, G. and Olivier, M. (2019) 'The fundamental right of social assistance: A global, a regional (Europe and Africa) and a national perspective (Germany, the Netherlands and South Africa)', *European Journal of Social Security*, 21(3), 219-240; cf on sanction mitigation clauses: Eleveld, A. (2018) 'The sanctions mitigation paradox in welfare to work benefit schemes', Comparative Labour Law and Policy Journal, 39(2), 449-474.